

REMARKS

This Amendment cancels Claims 7 and 10 and adds the limitations therein to independent Claim 1. Claims 1-6, 8, 9 and 11 - 16 remain in this application.

The Claims stand rejected under 35 U.S.C. 102(b) over JP 05-139921 (“Suzuki”) or under 35 USC 103(a) over the combination of Suzuki with WO 01/26468 (“Senn”) as set forth in the Office Action.

With regard to the combination of Suzuki and Senn, Applicants respectfully again assert that the Office Action has not established a prima facie case of obviousness because there is no teaching, motivation or suggestion in either reference to combine the references with one another to arrive at the instantly claimed combination, and because it is only through impermissible hindsight using the Applicants' specification as a guide that one would be motivated to combine the references.

Again with regard to the 102(b) rejection of the claims over Suzuki, or the combination of Suzuki and Senn for the 103(a) rejection, Applicants respectfully assert that an impermissible form of hindsight is being employed. The machine language translation is so full of sentence fragments and gibberish, that it is not understandable. Only by using the present specification, and looking through the machine language translation for sentence fragments that might seem to support the Office Action's position, could one conclude that the machine language translation teaches anything at all. And certainly, one skilled in the art having only Suzuki would not be motivated to arrive at the present invention, nor to combine it with Senn to arrive at the present invention.

Again Applicants object to the Examiner's use of a computer-generated translation of this Japanese language document, contending that the translation contains so many grammatical errors and mistranslations as to render it unreliable as a reference for rejecting claims under 35 U.S.C. §§102(b) or 103(a). Tellingly, if the translation was obtained from the Japanese Patent Office, the Japanese Patent Office itself warns that it disclaims any responsibility for “damages caused by the use of this translation” and stating that it, “... may not reflect the original precisely.”

Appellants again object to the Examiner's use of a computer-generated translation of this Japanese language document, contending that such translations contain so many grammatical errors and mistranslations as to render them unreliable as references for rejecting claims under both 35 U.S.C. §§102(b) and 103(a). At most the MPEP might indicate that language reference resources such as machine translations might be used in early stages of

prosecution (MPEP 901.05(d), but Applicants were unable to locate any definition in the MPEP of "language reference resources" which embraced machine translations. Further, even if MPEP 901.05(d) allowed the use of such machine language translations, Applicants respectfully request that the Examiner advise as to what point in this prosecution is no longer considered to be in the "early" stages? Is it when a Final Office Action has been received? Is it when, as in the instant case, the application is on appeal to the Board? When it is on appeal to the Federal Circuit? When the application is involved in an Interference proceeding?

Absent such a translation, Applicants assert the rejections cannot stand and respectfully request withdrawal of the rejections and allowance of the pending claims.

In an effort to advance prosecution of this case, Applicants have amended Claim 1 to claim the use of the insecticide as a seed treatment, which is clearly not anticipated or rendered obvious by the art of record.

Applicants also acknowledge with much appreciation that the Examiner has requested a translation of the Suzuki reference.

However, Applicants never received it.

Applicants also point to MPEP 901.05(d) to state that it was not proper to make this last Office Action a Final Office Action until Applicants had a chance to see that translation. Applicants are filing herewith a Request for Continued Examination and its rather considerable fee to reopen prosecution of this case. Applicants request that the next Office Action not be made final to give Applicants a chance to see the translation and respond to it and Applicants respectfully ask the Examiner to provide it to the undersigned as soon as it is available.

Respectfully submitted,

By Raymond J. Harmuth
Raymond J. Harmuth
Attorney for Applicant
Reg. No. 33,896

Bayer CropScience LP
2 T.W. Alexander Drive
Research Triangle Park, NC 27709
Ph: 919-549-2102
Fax: 919-549-3994
q:/prosecutiondocuments/cs78890/amendment10-26-07